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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>TIMOTHY JAMES SALAZAR,<br>Defendant and Appellant. | G042244<br>(Super. Ct. No. BAF003806)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Riverside County, Peter L. Spinetta, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part for resentencing.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Before trial, defendant Timothy James Salazar pleaded guilty to two counts of corporal injury on a cohabitant (Pen. Code § 273.5, subd. (a); all further statutory references are to this code unless otherwise specified), one count of false imprisonment (§ 236), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), and one count of making a criminal threat (§ 422). A jury then convicted defendant of two counts of assault with a deadly weapon on a police officer (§ 245, subd. (c)) and six counts of willfully possessing an explosive (§ 12303.2). It could not reach a verdict on two counts of attempted murder of a police officer (§§ 664, subd. (e), 187, subd. (a)), two counts of exploding or attempting to explode an explosive with intent to commit murder (§ 12308), and six counts of possessing an explosive with intent to intimidate or injure (§ 12303.3). Defendant pleaded guilty to the latter six counts and the court dismissed the remaining charges. Defendant was sentenced to a total of 14 years in prison, which included the upper term of six years on the first of the six counts of possessing an explosive device, a consecutive term of one year, four months for another of the counts, and concurrent terms of four years for the remaining four of those counts.

Defendant appeals on several grounds: 1) He could be convicted of only one of the six counts of possessing an explosive, or, in the alternative, sentenced for only one of them; 2) it was error to admit evidence of prior domestic violence; 3) prosecutorial misconduct; 4) three instructional errors; and 5) a sentencing error under section 1170. We agree defendant should have been sentenced for only one of the six counts of willfully possessing an explosive device. We therefore vacate the sentence and remand for resentencing. In resentencing defendant the court shall stay sentences on five counts of willful possession of an explosive device. In all other respects the judgment is affirmed.

## FACTS

In late 2004, after a short marriage, defendant's wife, Sherry, wanted a dissolution and moved out of the house the two shared. When Sherry returned to the house a couple of weeks later to get some of her belongings, defendant committed an act of domestic violence against her, during which he threatened to kill her, her family, and himself, saying he had no reason to live. Sherry reported the incident to the police; officer Jeremy Bobo took the report.

A week and a half later Sherry again went to the house, incorrectly believing defendant was absent. While she was there defendant told her "he was desperate about his situation" and wanted to move back into the family residence "so that the [domestic violence] charges against him could be reduced [and] it would look like [they] were a happy family again." He told her he had no money, food, or shelter and again threatened to kill her and himself. Defendant showed Sherry a duffel bag containing five or six pipe bombs. Sherry refused to accede to defendant's requests. He committed another act of domestic violence, injuring Sherry.

Defendant drove Sherry to the hospital, taking the bag of bombs with him in his van. At Sherry's request, hospital personnel called the police. When Corporal Smith arrived Sherry told him about the domestic violence and the duffel bag of bombs. Shortly thereafter defendant called 911, advising the operator that he was the man who had taken his wife to the hospital as a result of his domestic violence. He asked Smith to meet him at a designated location. When the operator asked if he had any weapons defendant told her he had explosives.

That evening, California Highway Patrol Officer Todd Maxson, in uniform and driving a marked patrol car, was on duty. After receiving a dispatch directive to look for the van defendant was driving, he saw it and followed it into parking lot. When Maxson called for back up, Bobo went to the parking lot.

Maxson got out of his car, staying behind his driver's door, and ordered defendant to get out of his van and "put his hands out of the window so he wouldn't get hurt." Defendant replied that he "want[ed] to get hurt." When defendant put his hand out of the window Maxson saw that he was holding two "stick-type objects," which he believed were pipe bombs; the fuses were lit. Bobo also saw the bombs. When defendant threw the bombs toward Maxson and Bobo, only one exploded. Neither officer was hurt.

There were then two additional explosions in the van. Defendant, clothing smoldering, left the van with his hands up. After being ordered to do so, defendant laid down on the ground, advising he had another explosive in his jacket. Defendant later admitted to police he had made all six bombs, explaining he wanted to use them to kill himself.

Defendant testified on his own behalf, stating that he had contemplated suicide since an incident in 1989, while, as a sheriff's deputy, he was assigned to recover bodies from a helicopter crash, including the body of a fellow officer. Later, after a friend stopped him from shooting himself, defendant started thinking of ways he could successfully end his life without maiming himself. His wife divorced him and he left the police force. During the next several years he had periods of intermittent depression. After an injury forced him to leave a well-paying job, he began to work weekends and odd hours and had trouble making monthly payments; the depression returned.

By this time he was married to Sherry, who became unhappy in the marriage. Once he and Sherry separated he became very depressed and thoughts of suicide increased. As a result of the first domestic violence incident he spent three or four days in jail. He began planning his suicide and bought the items required to make the explosives. He chose materials that were less lethal because he did not want to harm anyone other than himself.

On the day of the second incident of domestic violence, after he showed Sherry the bombs and took her to the hospital, he called police to tell them where he was going. He did not believe anyone would be at his chosen destination and thought he would have about five minutes to detonate the bombs before police showed up. When officers arrived he was holding four of the bombs in his lap. While holding a lit cigarette lighter, he tried to untangle their fuses and accidentally lit one. Fearing he would only be maimed by one bomb, he threw it and another out the car window. He lit the other two bombs and put them inside his jacket, intending to blow himself up. Defendant testified he had no intention of harming police officers when he threw the two bombs outside but did so in a panic. The only reason he built the explosives was to kill himself.

Also testifying on behalf of defendant was a clinical psychologist who had interviewed defendant and reviewed several reports and other documents relating to him. He was of the opinion defendant suffered from post traumatic stress disorder, some of the symptoms of which are feelings of helplessness and hopelessness, which lead to thoughts of suicide. He opined that on the day of the incident defendant wanted to kill himself.

## DISCUSSION

### *1. Possession of Explosive Devices*

Defendant was convicted of six counts of willful possession of an explosive under section 12303.2. He contends he should be punished only for "the single act of possessing multiple explosives simultaneously." He bases this on the alleged ambiguous language of the statute, cases interpreting similar language, and the rule of lenity. We disagree.

Section 12303.2 makes it a felony for a person to "recklessly or maliciously" possess "*any* destructive device or *any* explosive" (italics added) in public places. *People v. DeGuzman* (2004) 113 Cal.App.4th 538 interpreted the meaning of

"any" in this section and a related statute, section 12303.3, which makes it a felony to possess "*any* explosive" with the intent to injure. (Italics added.) In *DeGuzman,* after the defendant was convicted of 54 counts of violating each statute, the trial court dismissed all convictions but one under each statute. In reversing, the appellate court held the term "'any,' as used in sections 12303.2 and 12303.3, defines the unit of possession in singular terms" allowing for "multiple convictions under each statute when [a defendant] possesses more than one unlawful item of the same kind at the same time and place." (*People v. DeGuzman, supra,* 113 Cal.App.4th at p. 548.)

In arriving at this conclusion the court traced the legislative intent of the statutes, beginning first with a review of *People v. Kirk* (1989) 211 Cal.App.3d 58 that construed former section 12020, subdivision (a), which made it a felony for a person to possess "'any instrument or weapon'" "'known as a . . . sawed-off shotgun . . . .'" (*People v. DeGuzman, supra,* 113 Cal.App.4th at p. 543.) *Kirk* determined use of the term "any" made the statute ambiguous on its face because it did "not necessarily define the unit of possession in singular terms. [Citation.]" (*People v. Kirk, supra,* 211 Cal.App.3d at p. 65.) *Kirk* also found no legislative intent to help construe the meaning of "any." (*Ibid.*) Based on those factors, *Kirk* held the defendant could only be convicted of one count of possessing the sawed-off shotgun even though he actually had two. (*Ibid.*)

In response to *Kirk* the Legislature amended section 12001 to add subdivision (*l*), stating that under section 12020 possession of each weapon "constitute[d] a distinct and separate offense." (Stats. 1994, First Ex.Sess. 1993-1994, ch. 32, § 1, p. 5; *People v. DeGuzman, supra,* 113 Cal.App.4th at p. 544.) After the amendment *People v. Rowland* (1999) 75 Cal.App.4th 61 followed *Kirk*'s holding and rationale in relation to a statute prohibiting possession of "any" weapon while in prison because that statute had not specifically been mentioned in the revised section 12020. (*People v. Rowland, supra,* 75 Cal.App.4th at p. 65-66.)

*DeGuzman* did not follow *Kirk* or *Rowland*. Rather, it concluded the term "any" as used in sections 12303.2 and 12303.3 was ambiguous (*People v. DeGuzman, supra,* 113 Cal.App.4th at pp. 545-546), but found a review of legislative intent helpful in construing the meaning of the statute. (*Id*. at p. 547.) It stated that the Legislature intended "to single out destructive devices for special treatment because [they] are fundamentally different from ordinary weapons" (*id*. at p. 546) due to their "'"'inherently dangerous nature" [citation]'" (*id*. at p. 547). *DeGuzman* held that section 12303.3 was "fundamentally different from ordinary weapons statutes" because "rather than prohibiting mere possession, [it] equates possessing a bomb with exploding or attempting to explode a bomb." (*People v. DeGuzman, supra,* 113 Cal.App.4th at 547.)

*DeGuzman* also relied on *People v. Ramirez* (1992) 6 Cal.App.4th 1762 that construed section 12308, which prohibits exploding of "any" destructive device with the intent to commit murder. *Ramirez* upheld the defendant's conviction of two counts of violating section 12308 for the explosion of a Molotov cocktail that killed two people, holding that "section 12308 defined the crime in terms of an act of violence against the person." (*People v. DeGuzman, supra,* 113 Cal.App.4th at p. 547.) *DeGuzman* noted, "The only material difference between sections 12303.3 and 12308 is that the former requires an intent to injure or the like while the latter requires an intent to murder." (*People v. DeGuzman, supra,* 113 Cal.App.4th at p. 547.) The court extrapolated from *Ramirez* that "a person who explodes more than one device at the same time and place with intent to injure more than one person commits multiple violations of section 12303.3." (*Ibid*.)

*DeGuzman* then reasoned that section 12303.2 is "part of the same statutory scheme[ as section 12303.3,] [t]he only material difference . . . [being] that the [former] prohibits possession in certain places while the [latter] prohibits possession with an intent to injure . . . ." (*People v. DeGuzman, supra,* 113 Cal.App.4th at p. 548.) On that basis,

it concluded, the Legislature must have intended the word "any" to have the same meaning in both statutes. (*Ibid*.)

Defendant argues both *Ramirez* and *DeGuzman* are distinguishable. He maintains *DeGuzman* erred in relying on *Ramirez* because the issue was different – *Ramirez* did not address the issue of multiple devices but only multiple objectives. Moreover, section 12303.2 deals only with possessing explosive devices as opposed to using them.

True, the facts in *Ramirez* were different; but *DeGuzman* relied not on the facts but on the reasoning in reaching its conclusion. Moreover, although defendant is correct that section 12303.2 deals only with possessing explosive, *DeGuzman* concluded "any" had the same meaning as in section 12303.3 because they were based on the same statutory scheme. We concur with its reliance on the "well-established rule of statutory construction that when a word . . . has been given a particular . . . meaning in one part or portion of a law it shall be given the same . . . meaning in other parts or portions of the law. [Citation.]" (*People v. DeGuzman, supra,* 113 Cal.App.4th at pp. 547-548.)

Thus, the several cases defendant cites that construed "any" in statutes dealing with possession of a variety of illegal items such as controlled substances, weapons, and pornography do not apply. (E.g., *People v. Hertzig* (2007) 156 Cal.App.4th 398, 399 [under § 311.11 prohibiting possession of child pornography, possession of multiple images constituted one offense]; *People v. Rouser* (1997) 59 Cal.App.4th 1065, 1073 [under § 4573.6 barring possession of "any controlled substances" in prison, possession of more than one narcotic was single offense].) They do not concern explosives and are not part of the same statutory scheme.

Defendant also argues that based on the ambiguity of section 12303.2, the rule of lenity should be applied. According to *DeGuzman*, "The rule of lenity applies only if the court can do no more than guess what the Legislature intended; there must be an egregious ambiguity and uncertainly to justify invoking the rule. [Citation.] 'Thus,

although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent.' [Citation.]" (*People v. DeGuzman, supra,* 113 Cal.App.4th at p. 546.) Here, *DeGuzman*'s analysis and reasoning reasonably resolve the ambiguity that appears at first blush.

*2. Sentencing for Possession of Explosive Devices*

Defendant asserts that even if the multiple convictions for possessing explosives are affirmed, the sentencing must be reversed based on section 654, which prohibits multiple punishment where a single action results in multiple convictions. It declares that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) The operation of this section has been described thus: "The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] . . . The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

In sentencing defendant for the six counts of willfully possessing a bomb under section 12030.2, the court selected the first of those counts as the base term and

imposed a six-year term with one consecutive one year, four month term and concurrent four-year terms on the remaining four counts. Defendant contends "the singular act of possessing several destructive devices . . . constituted a single act or indivisible course of conduct" such that he could be sentenced for only one violation of section 12303.3 with sentencing on the other counts stayed. We agree.

In support of the sentence the Attorney General relies on *People v. Ramirez, supra*, 6 Cal.App.4th 1762. There the defendant was convicted of two counts of exploding a bomb under section 12308 based on his throwing a Molotov cocktail into an apartment occupied by several people. The appellate court affirmed two consecutive sentences for the convictions, holding they did not violate section 654 because defendant had the intent to hurt two people. (*People v. Ramirez, supra,* 6 Cal.App.4th at p. 1767.)

As defendant correctly points out, *Ramirez* differs from our case. Section 12303.3 criminalizes only possession of a bomb, not exploding it, so the intent to harm is not an issue. The fact that more than one person was theoretically put in danger, as the Attorney General argues, as opposed to actually being harmed, is not determinative. (Cf. *People v. Neal* (1961) 55 Cal.2d 11, 20-21.) Possession of even one explosive device could have put more than one person in danger.

Thus, the court should have sentenced defendant on only one count and stayed sentencing on the remaining five counts. We vacate the sentence and remand for resentencing. On resentencing, sentences on five counts under section 12303.2 must be stayed.

*3. Section 1170*

In sentencing defendant on the six counts of willful possession of an explosive (§ 12303.2), for the principal count the court selected the upper term of six years based on the "seriousness of the crime . . ., the need to protect the public safety"

and the fact there were multiple counts. It also noted the sentences for the remaining counts were going to run concurrently.

Defendant points out that the determinate sentencing law (DSL) in effect at the time he committed his crimes was invalidated by *Cunningham v. California* (2007) 549 U.S. 270, [127 S.Ct. 856, 166 L.Ed.2d 856]. He argues his sentencing under the amended DSL (§ 1170) violated ex post facto principles and the prohibition against retroactive application of statutes under section 3 (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 [new statute presumptively "operate[s] prospectively absent an express declaration of retrospectivity or a clear indication . . . the Legislature intended otherwise"]). We disagree.

*People v. Sandoval* (2007) 41 Cal.4th 825 "held it is constitutionally appropriate to apply the amended version of the DSL in all sentencing proceedings conducted after the effective date of the amendments, regardless of whether the offense was committed prior to the effective date of the amendments." (*People v. Jones* (2009) 178 Cal.App.4th 853, 866-867.) The amendments did not increase defendant's potential punishment but instead gave more discretion to the trial court to impose the upper term. (*People v. Sandoval, supra,* 41 Cal.4th at p. 857.) *Sandoval* further held sentencing after the revision of the DSL did not impinge on defendant's due process rights because he had notice he could have been sentenced to the upper term. (*Ibid*.)

*Sandoval* also stated, "A change in substantive criminal law is retroactive if applied to cases in which the crime occurred before its enactment, but a change in procedural law is not retroactive when applied to proceedings that take place after its enactment." (*People v. Sandoval, supra,* 41 Cal.4th at p. 845.) Although *Sandoval* did not rely on this principle for its decision, it did hold it was "appropriate" to resentence under the revised DSL and section 1170 as reformed. (*People v. Sandoval, supra,* 41 Cal.4th at p. 846.) Logically the same should apply to initial sentencing. As defendant

acknowledges *Sandoval* binds us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also *People v. Jones, supra,* 178 Cal.App.4th at p. 867.)

Since we do not concur with defendant's ex post facto and retroactivity arguments, we need not consider his claim based on judicial reformation of section 1170 as discussed in *Sandoval*.

*4. Evidence of Prior Domestic Violence*

Defendant challenges admission of evidence about the two incidents of domestic violence involving Sherry. He contends that, because the incidents did not qualify under Evidence Code section 1101, subdivision (b) and were barred by Evidence Code section 352, the court abused its discretion by allowing their admission.

Before trial, the prosecution sought permission to introduce the details of various incidents of domestic violence committed by defendant, including one in 1999 involving his first wife and another involving his girlfriend in 1995. When the court indicated it might allow some of the evidence to be admitted, defendant pleaded guilty to the several domestic violence counts.

Subsequently, after further arguments, the court ruled that, although the specifics of the incidents were not admissible, the prosecution could introduce evidence that defendant committed the two acts of domestic violence against Sherry, that she filed a police report the first time, and that the second time defendant took her to the hospital at her request. At trial Sherry testified as set out in the statement of facts.

Evidence Code section 1101, subdivision (a) prohibits "evidence of a person's character or trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." But that evidence is admissible "when relevant to prove some fact (such as motive, . . . intent, . . . knowledge, . . . [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

Defendant asserts admission of the evidence was erroneous because it had no tendency to prove whether he intended to kill the officers, whether it was reasonable for him to know his acts would harm the police, or whether possessing the bombs was malicious or reckless. Specifically he argues that although the long-standing general rule allows evidence of prior violent acts against a victim (e.g., *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610 and cases cited therein), it is inapplicable here because the police who were the victims of the charged crimes were not the target of his prior assaults. His violence toward Sherry was not relevant to his intent to harm the officers.

But this paints the evidence too narrowly. During the two incidents of domestic violence, defendant threatened to kill not only himself but also Sherry and her family. This evidence tends to negate the claim that defendant's only intent was to commit suicide, as opposed to harming others as well. Further, "the least degree of similarity between the uncharged and charged acts is sufficient to prove intent because the recurrence of a similar result tends to negative accident, inadvertence, good faith, or other innocent mental state. [Citation.]" (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115; see *People v. Miller* (2000) 81 Cal.App.4th 1427, 1447-1448 ["Other crimes evidence is admissible '"where the proof of defendant's intent is ambiguous, as when he admits the acts and denies the necessary intent because of mistake or accident"'"].) In addition, the domestic violence evidence put the facts of the case in context—the reason why defendant made the bombs and telephoned Smith, asking him to meet him at the location where he intended to explode the bombs.

Defendant also maintains that even if the evidence was relevant it should have been rejected under Evidence Code section 352. He again relies on his argument that there was little probative value in the domestic violence evidence as applied to crimes concerning the police officers. He contends that evidence of domestic violence is "uniquely prejudicial," painting him as a "wife batterer" and "an immoral person unworthy of the jury's belief or consideration." (*People v. Sam* (1969) 71 Cal.2d 194,

206.) He also maintains the evidence "effectively deprived" him of his defense that he intended only to commit suicide because it suggested his testimony was not credible.

As defendant notes evidence should be excluded under Evidence Code section 352 only where its prejudicial effect outweighs its probative value. "'Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.) We review the admission of evidence under Evidence Code section 352 for abuse of discretion.

Here the court did not abuse its discretion. It carefully considered the prior acts evidence the prosecution sought to introduce, holding several hearings and taking the matter under submission. It limited what the prosecution was allowed to present to only a very general description of the acts and excluded some of the proffered evidence, including details of domestic violence events involving a prior girlfriend and an ex-wife.

Moreover, after Sherry testified, the court immediately instructed the jurors that there were no domestic violence counts in the case and that the details of the incidents were relevant only to defendant's intent. (See *People v. Lewis* (2001) 25 Cal.4th 610, 637 [potential prejudice of evidence admitted under section 1101 minimized by instructing jury "that such evidence could not be considered to prove defendant was a person of bad character or that he had a disposition to commit crime"].) At the close of the case the court also gave CALCRIM No. 303, instructing that evidence admitted for a limited purpose could not be considered for any other purpose. We presume the jury followed the instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

As a final argument defendant claims this evidence violated his federal due process rights. But "admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439; see *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385].) Defendant has not made such a showing. As discussed above,

the evidence was relevant and probative. The jury instructions focused on its limited admissibility. Further, as the Attorney General points out, the jury did not convict defendant of most of the serious charges, including two counts of attempted murder, six counts of willfully possessing a bomb with intent to injury, and two counts of exploding a bomb with the intent to kill, leading to the conclusion it did not rely on the domestic violence. Thus, defendant has not shown it was reasonable probable the outcome of the trial would have been more favorable had the evidence been excluded.

*5. Prosecutorial Misconduct*

Defendant asserts the prosecutor committed misconduct in her closing argument when she compared defendant's acts in this case to murders at Columbine High School and Virginia Tech, stating: "Now, . . . let's talk about what really happened [the day of the crime]. Yes, defendant attempted suicide. People are not disputing that, but he attempted a homicide/suicide. And those two attempts are not and were not . . . mutually exclusive. [¶] Murder/suicide. Columbine, Virginia Tech. We've seen it. [¶] [Defense counsel]: This is inappropriate argument relating this case to Columbine, Virginia Tech."

The court then instructed the jury: "I caution the jury, and the reason there is always concern when there is reference to some incident such as that, is that it may distract you from the particular evidence in this case and improperly prejudice you in some fashion or form or improperly inflame you. [¶] Obviously, the Virginia Tech situation, from what we gathered from reading in newspapers, was a horrendous situation. And the danger when an example like that is used as an illustration, and, I believe, in fact, I even used it in one of my questions to . . . one of the experts in this case, the danger of that is that it may serve simply to inflame without educating you with respect to anything relevant in this case. [¶] What happened there, of course, is one thing. What happened here is a different thing. So I just caution you. Make sure that you

understand that this example that counsel is embarking upon, Virginia Tech or the others that she mentioned, is just simply to illustrate some point that might be rel[event] to this case. But please don't let it confuse you or anything about that matter to spill over and affect you in this case."

The prosecutor then continued, "Yes, those cases were brutal, and I'm not trying to invoke emotion here, so if I can actually have you back your minds away for a second from the brutality of it, what I'd like to do, quite frankly, is draw your attention to the similarities here. What we had in those incidents was we had people . . . that were loners, that couldn't establish other relationships, that couldn't fit in . . . ."

Defendant contends the prosecutor's comments improperly appealed to the jury's passions and prejudices. Those incidents were recent and "notorious" and the comparisons were used "to suggest that [defendant] was a similarly dangerous individual as those who had perpetrated these infamous mass killings."

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here defendant has not shown a reasonable likelihood the jurors relied on the Columbine or Virginia Tech cases to convict him. The context of the prosecutor's remarks were limited to showing a person intent on committing suicide could also intend to commit a homicide. This was consistent with the judge's questioning of defendant's expert, a psychologist, who had testified he thought defendant was suicidal the day the crimes were committed. The judge asked whether, considering incidents such as Virginia Tech and shootings in post offices, "a person could be both suicidal and homicidal." The

court wanted to know whether someone could hold both intents. The expert replied that it was "rare" "but it could happen." The court continued with several questions in this vein, concluding with a comment that the expert might not be "in a position to have an opinion about the perpetrator in [the Virginia Tech] case" and the court had "just used [it] for illustrative purposes," confirming again a person could "entertain both intents." Defense counsel then asked whether it was "possible that a person [could be] suicidal without being homicidal" to which the expert replied, "correct." Thus, the prosecutor's comments were not pulled out of the air but were made in line with the narrow inquiry initiated by the court.

In evaluating a claim of prosecutorial misconduct, "[w]hen a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided. [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 595.) "[A] prompt admonition by the court to disregard the statement is generally deemed to remedy the problem arising from improper argument by the prosecutor. [Citation.]" (*People v. Smith* (2009) 179 Cal.App.4th 986, 1007.) Here, the court immediately instructed the jurors not to compare the case before them to the two examples or to be confused by them. This was sufficient to cure any possible prejudice.

Defendant appears to argue both his state and federal constitutional rights were implicated by the comments. "Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such '"unfairness as to make the resulting conviction a denial of due process."' [Citation.] By contrast, our state law requires reversal when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' [citation] and '"it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct"' [citation]." (*People v. Davis* (2009) 46 Cal.4th 539, 612.) Defendant has not shown either of these scenarios.

Further, the court instructed the jury with CALCRIM No. 222, which provides that nothing the prosecutor says during argument is evidence and CALCRIM No. 200, requiring the jury to follow the instructions. We presume the jury understood and followed the jury instructions. (*People v. Boyette, supra*, 29 Cal.4th at p. 436.)

*6. Jury Instructions*

*a. CALCRIM No. 220*

CALCRIM No. 200 states in part: "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial." CALCRIM No. 222, also given, defines evidence as "the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence."

Defendant challenges CALCRIM No. 220 on several grounds. First he asserts that in weighing reasonable doubt the jury was instructed to consider only evidence actually introduced and was not allowed to take into account the lack of evidence. He also argues the instruction reduced the prosecutor's burden of proof to preponderance of the evidence, thereby violating his due process right to proof beyond a reasonable doubt. He claims this error is reversible per se. We are not persuaded.

All of these arguments have been considered and rejected. (*People v. Zavala* (2008) 168 Cal.App.4th 772, 781 [court discredited argument instruction "'require[d] the defendant to persuade the trier of fact of his innocence by evidence presented at trial and eliminates the doctrine of reasonable doubt due to *lack of evidence*'"]; *People v. Stone* (2008) 160 Cal.App.4th 323, 330-332 [instruction does not direct use of preponderance of evidence standard]; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1268 [instruction does not bar jury from considering lack of evidence in determining reasonable doubt but "instructs the jury to acquit in the absence of evidence"].) As stated in *Guerrero*, "The jury is instructed to consider only the

evidence, and to acquit unless the evidence proves defendant's guilt beyond a reasonable doubt. If the government presents no evidence, then proof beyond a reasonable doubt is lacking, and a reasonable juror applying this instruction would acquit the defendant." (*People v. Guerrero, supra*, 155 Cal.App.4th at pp. 1268-1269.) We see no reason to deviate from the holdings in these cases.

*b. CALCRIM No. 226*

CALCRIM No. 226 states, in part: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, *use your common sense and experience*. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, socioeconomic status, or other impermissible bias. You may believe all, part, or none of any witness's testimony. Consider the testimony each witness and decide how much of it you believe." (Italics added.)

Defendant challenges the italicized portion, claiming this allowed jurors to consider evidence outside of the record, i.e., their experiences, and decide based on less than proof beyond a reasonable doubt, thereby implicating his federal constitutional rights.

The same argument was made and rejected in *People v. Campos* (2007) 156 Cal.App.4th 1228, where the court stated: "To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do. In approaching any issue, a juror's background, experience and reasoning must necessarily provide the backdrop for the juror's decision making, whether instructed or not. CALCRIM No. 226 does not tell jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience." (*Id.* at p. 1240.)

In *Campos*, the court also relied on other instructions given "that the term 'common sense and experience' is not a license to consider matters outside of the evidence." (*People v. Campos, supra,* 156 Cal.App.4th at p. 1240.) The instructions given there, CALCRIM No. 200 (decision must be based on evidence introduced); CALCRIM No. 201 (jurors may not research or investigate); CALCRIM No. 220 (guilt must be determined based on evidence presented); CALCRIM No. 222 (consider only evidence introduced); CALCRIM No. 223 (all evidence must be consider in deciding whether a fact proven); CALCRIM No. 301 (consider all evidence to determine if one witness's testimony proves a fact; and CALCRIM No. 302 (method of evaluating conflicting evidence) (*People v. Campos, supra,* 156 Cal.App.4th at p. 1240), were given in the present case as well. In light of *Campos*, defendant's argument has no merit.

*c. CALCRIM No. 860*

CALCRIM No. 860 instructs the jury as to the elements of assault with a deadly weapon on a police officer. Part of the instruction explains that the prosecution is not required to prove certain facts, including that "defendant actually touched someone" or "actually intended to use force against someone when he acted," and that "[n]o one needs to actually have been injured by defendant's act." (*Ibid.*)

Defendant argues this instruction is argumentative because "by commenting on specific evidentiary matters which need not be proven, the judge is effectively arguing the case on behalf of the prosecutor," thereby violating his Fifth, Sixth, and Fourteenth Amendment rights. He also contends these portions of the instruction are duplicative because "the jury has already been instructed on what must be proved . . . ." These arguments are without merit.

*People v. Flores* (2007) 157 Cal.App.4th 216 addresses most of defendant's claims. In that case the defendant challenged an instruction similar to CALCRIM No. 860, i.e., CALCRIM No. 875, which deals with the crime of assault with a deadly

weapon. It includes the identical language at issue here and the defendant claimed it was argumentative. (*People v. Flores, supra,* 157 Cal.App.4th at p. 220.) The court described an argumentative instruction as one that "'invite[s] the jury to draw inferences favorable to [a party] from specified items of evidence on disputed questions of fact,'" "'identif[ies] witnesses [citation], or in any way favor[s] the prosecution over the defense [citation]'" and determined the challenged instruction did not fall within that definition. (*Ibid.*) In addition, because the crime of assault did not require proof of an intent to use force it was proper to instruct the jury to that effect. (*Ibid.*)

The court also held the instruction was not improperly duplicative. (*People v. Flores, supra,* 157 Cal.App.4th at pp. 220-221.) Because assault under section 245, the same statute under which defendant here was charged, "'focuses on use of a[n] . . . instrument . . ., whether the victim in fact suffers any harm is immaterial.' [Citation.]" (*People v. Flores, supra,* 157 Cal.App.4th at p. 221.) The court stated the instruction was proper to avoid "juror confusion" about what had to be proven and what did not. (*Ibid.*)

Defendant discounts *Flores* because it does not address his claim the instruction "ha[s] a tendency to diminish the weight of the evidence . . . ." He argues that lack of touching and absence of injury, for example, could be relevant as to whether a reasonable person would expect an application of force. But the instruction does not forbid the jury from considering those facts; it only states the prosecution is not required to prove them. Use of CALCRIM No. 860 was not improper.

## DISPOSITION

The sentence is vacated and the case is remanded for resentencing. On resentencing the sentences on five of the counts under section 12303.2 must be stayed. The judgment is otherwise affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.